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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DALE HAWKINS,

Defendant and Appellant.

B289363

(Los Angeles County
Super. Ct. No. BA238853)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Nicholas J. Webster and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Dale Hawkins appeals from the trial court’s denial of his Three Strikes Reform Act of 2012 (Proposition 36) petition to recall his indeterminate sentence for second degree burglary. The trial court determined that Hawkins was ineligible for resentencing under Proposition 36 because he was armed with a deadly weapon—a rock—when he committed the burglary. We agree with the trial court and affirm.

BACKGROUND

On November 11, 2002, Hawkins threw a rock through the glass door of a closed donut shop and entered the premises. Sary Siv, who was working in the shop, confronted Hawkins with a knife and told him to leave. Hawkins left, but later returned and tried to remove the cash register. Siv again approached with a knife, and Hawkins dropped the cash register and fled. Hawkins entered the store again and threw a seven and one-half inch rock (a different rock than the one he used to shatter the glass door) that hit Siv, then fled.¹ The entire incident lasted five to six minutes.

Hawkins was convicted of second degree burglary (Pen. Code, § 459; count 1)², attempted second degree robbery (§§ 664, 211; count 2), and assault with a deadly weapon (§ 245, subd. (a)(1); count 3). He was sentenced to an indeterminate sentence of 30 years to life on count 2 and concurrent sentences of 25 years to life for each of counts 1 and 3 based on the “Three Strikes” law.

¹ Hawkins’s briefs here claim he entered the store five different times.

² All further statutory references are to the Penal Code unless otherwise specified.

We affirmed the judgment. (*People v. Hawkins* (Apr. 27, 2004, B166855 [nonpub. opn.].)

On January 14, 2014, Hawkins filed a petition to recall his sentence under Proposition 36. The trial court denied the petition on the ground that Hawkins’s conviction for attempted robbery qualified as a serious felony conviction (§ 1192.7, subd. (c)(39)), which rendered Hawkins ineligible for resentencing as to any count. Hawkins appealed. Based on the Supreme Court’s opinion in *People v. Johnson* (2015) 61 Cal.4th 674, 695, we reversed and directed the trial court to reconsider Hawkins’s petition as to the sentence for second degree burglary. (*People v. Hawkins* (Aug. 26, 2015, B257106 [nonpub. opn.].)

In accordance with our opinion, the trial court issued an order to show cause why Hawkins’s sentence as to count 1 should not be recalled and why Hawkins should not be summarily resentenced for second degree burglary. After briefing and an evidentiary hearing, the trial court issued an order denying Hawkins’s petition to recall his sentence as to the second degree burglary count. The trial court determined that Hawkins was not eligible for resentencing under Proposition 36 because he “was ‘armed with a firearm or deadly weapon’ or ‘intended to cause great bodily injury to another person’ ” when he committed the burglary. (§ 1170.126, subd. (e)(2); §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Hawkins appealed.

DISCUSSION

Certain criminal defendants sentenced under California’s Three Strikes law may petition the trial court for resentencing if they are serving an indeterminate term of imprisonment for a crime that would not result in an indeterminate term under

Proposition 36. (§ 1170.126, subds. (a), (b).) One of the trial court’s responsibilities in deciding a petition for recall of a sentence is to determine whether the defendant is eligible for resentencing. If, “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person,” the defendant is ineligible.³ (§ 1170.126, subd. (e)(2); §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

“We review the factual basis for the trial court’s finding of resentencing ineligibility under the substantial evidence test. We review the whole record in a light most favorable to the order to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find ineligibility by a preponderance of the evidence.” (*People v. Valdez* (2017) 10 Cal.App.5th 1338, 1346 (*Valdez*).)

“‘A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively.’” (*Valdez, supra*, 10 Cal.App.5th at p. 1347; *People v. Garcia* (1986) 183 Cal.App.3d 335, 350.) In *Garcia*, the court concluded that a defendant who had left a gun outside a home he was burglarizing was “armed” because the gun was available to the defendant “for use at the scene of the burglary.” (*Garcia*, at pp. 340, 350-351.)

The record here supports a similar conclusion. Five to six minutes elapsed between the time Hawkins threw a rock through the glass door of the donut shop and the time he finally fled the

³ Hawkins does not dispute that the rock he threw at Siv was a “deadly weapon.” Hawkins contends only that he was not “armed” with that rock when he entered the store at any point during the incident other than the entries that resulted in the attempted robbery and assault with a deadly weapon convictions.

scene empty-handed after having thrown a second rock at Siv. In that five to six minutes, Hawkins entered the store and confronted Siv five times, jumped over the store counter in an attempt to steal the store's cash register, and retrieved a large rock and returned to attack Siv. In the five to six minutes with up to five separate entries into the store, it is not plausible that Hawkins had to spend time searching for the rock he eventually used to assault Siv.

The record supports the conclusion that the rock Hawkins eventually threw at Siv was available to Hawkins for the entire duration of the incident. That is all that is required to determine that Hawkins was "armed" with the rock he eventually threw at Siv during any of Hawkins's entries into the store that could have resulted in the burglary conviction. (See *People v. Washington* (1996) 50 Cal.App.4th 568, 579 ["every entry with the requisite intent supports a separate [burglary] conviction"].)

DISPOSITION

The trial court's order denying the Proposition 36 petition to recall Hawkins's second degree burglary sentence is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.